FOR ARGUMENT

No. 83-2143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF TENNESSEE,
Petitioner,

vs.

HARVEY J. STREET,
Respondent.

On Writ of Certiorari to the Court Of
Criminal Appeals Of Tennessee At Knoxville

REPLY BRIEF FOR THE PETITIONER

W. J. MICHAEL CODY
Attorney General of Tennessee
Counsel of Record

ROBERT A. GRUNOW
Associate Chief Deputy
Attorney General

WAYNE E. UHL
Assistant Attorney General

J. ANDREW HOYAL II
Assistant Attorney General

450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-7087

Counsel for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 83-2143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF TENNESSEE,
Petitioner,

vs.

HARVEY J. STREET,
Respondent.

On Writ of Certiorari to the Court Of
Criminal Appeals Of Tennessee At Knoxville

REPLY BRIEF FOR THE PETITIONER

ARGUMENT IN RESPONSE TO BRIEF FOR THE RESPONDENT

A. The Factual Circumstances Of This Case Far Remove It From Those Presented In Douglas And Bruton, Compelling A Different Result.

In both *Bruton v. United States,* 391 U.S. 123 (1968), and *Douglas v. Alabama,* 380 U.S. 415 (1965), the Court concluded that the codefendants' confessions were so "crucial" and "devastating" that the juries in those cases could not be expected to ignore the confessions in determining the guilt of the non-confessing defendants. Thus, notwithstanding limiting instructions or technical evidentiary rules, the confessions were deemed to have been considered for the truth of the matters asserted

therein. At that point, in the factual contexts of *Bruton* and *Douglas,* the principles of the Confrontation Clause came into play.

The respondent in his brief addresses at length the "principles of confrontation," including availability of the out-of-court declarant, reliability of the declarant's statement, and utility of cross-examination. This discussion necessarily and incorrectly assumes that the jurors in the instant case disregarded the limiting instructions of the trial judge and considered Peele's statement for its truth. On this point, the respondent asserts that "[t]here is . . . no relevant distinction between the instant situation and *Bruton* that would allow for a different result in the two cases." Brief for the Respondent at 14. The respondent also relies heavily on *Douglas* as a controlling precedent, as did the Court of Criminal Appeals.

The State has no argument with the respondent's discussion of "confrontation principles," nor do we contest their applicability in cases like *Bruton* and *Douglas* where there is a substantial risk that the codefendant's confession will be improperly considered for its truth. However, we seriously question the respondent's attempt to extend the *Bruton* and *Douglas* holdings far beyond the unique facts of those cases, on the threshold issue of whether, in this case, "[i]t is not unreasonable to conclude that . . . the jury can and will follow the trial judge's instructions . . . ." *Bruton,* 391 U.S. at 135.

To answer the respondent's assertions about the ability of the jury to limit its consideration of Peele's confession, and therefore the applicability of the Confrontation Clause, we will recapitulate the key factual distinctions between this case and *Bruton* and *Douglas.*

1. Unlike the defendants in *Bruton* and *Douglas,* Street had already "devastated" his alibi defense by his own "powerfully incriminating" confessions and statements, which included his admissions that he helped to plan the burglary, that he knew

that the "whipping" of the victim was a possibility, that he willingly participated in the burglary, that he was in the back of the truck when the victim was hanged, and that he had placed at least one of the loops of rope over the victim's head. (J.A. 75, 305, 353-358.)

The respondent counters that Peele's confession "portrayed Street as a principal actor and as a willing participant in the killing" as opposed to Street's claim that he was a mere accomplice and a somewhat reluctant participant. Brief for the Respondent at 42.[1] This is a far cry from the codefendants' confessions in *Bruton* and *Douglas,* which *by themselves* contributed critical elements to the prosecution cases.[2] Street's confessions, on the other hand, had already supplied a firm factual basis for a finding that he had at least aided and abetted premeditated first-degree murder, and the possibility that he had done so without reluctance or that he had been "more a principal actor" can hardly be considered to have been "devastating" to his case.[3] Moreover, the respondent has ignored the fact that he could have been found guilty on a felony murder theory, based simply

---

[1] In arguing this point, the respondent notes that Peele's confession "indicated that Street helped place the rope around Tester's neck . . . ." The respondent apparently has forgotten, as did the Court of Criminal Appeals, Street's June 27, 1982 confession in which he admitted placing a loop of rope around the victim's neck. (J.A. 74-76.)

[2] The codefendant's confession in *Douglas* was the only evidence that Douglas had actually fired the gunshot wounding the victim. 380 U.S. at 417. The codefendant's confession in *Bruton* appears to have been the only direct evidence that Bruton participated in the robbery. 391 U.S. at 124.

[3] As has been noted, Brief for the Petitioner at 2 n. 1, there was only one possible punishment for first-degree murder in this case, eliminating the possibility that mitigating circumstances could affect the jury's sentence. The respondent has never argued, nor could he do so convincingly, that his confession left open the possibility of a lesser degree of homicide.

on his participation in the burglary and without regard to the role he played in the killing itself.[4]

2. Also unlike the defendants in *Bruton* and *Douglas,* Street further minimized the potential impact of Peele's confession by informing the jury of its existence and of the fact that Peele had implicated Street in the murder. Defense counsel did so as early as the opening statement (R. III, 136), and Street reaffirmed it in his testimony (J.A. 190).

It seems intuitively true that most (if not all) of the impact of an accomplice's confession lies in the mere fact that the accomplice has named the defendant, particularly where the defendant claims alibi; the details of the confession are relatively insignificant, at least with respect to the defendant's guilt or innocence. With Street's revelation that Peele had confessed and named Street as an accomplice, the primary impact of Peele's confession was a *fait accompli.* The jurors, not surprised to discover that Peele had implicated Street, could more easily concentrate on the real import of the text of Peele's confession, i.e., whether it supported or belied Street's parroting claim.

The respondent argues that because he had challenged the voluntariness of his confession and raised an alibi defense, the substance of Peele's confession was all the more "devastating." Brief for the Respondent at 38-40. But it was Street who chose to stand or fall on the terms of Peele's confession, assuming the risk that his parroting claim would be legitimately "devastated" or "prejudiced" when the true terms of Peele's confession were revealed to the jury.[5] Thus this case can be fairly distinguished

[4] Interpretations of Tennessee's felony murder statute, Tenn. Code Ann. § 39-2-202(a), have generally followed traditional principles of felony murder. *See Farmer v. State,* 201 Tenn. 107, 114-117, 296 S.W.2d 879, 883-884 (1956).

[5] As this point illustrates, it was Street who wanted to "have his cake and eat it too," asking the jury to believe his parroting claim but prohibiting them from examining the best evidence of the veracity of that claim.

from those more routine cases in which a challenge to voluntariness does not bring into issue the very terms of an accomplice's confession.[6]

3. Another distinction between this case and *Bruton,* as noted in our main brief, is the fact that the jury could properly consider Peele's confession against Street under state evidentiary law, albeit for a limited purpose. The presumption that jurors are able to so limit their consideration of evidence is hardly novel, *see* I WIGMORE ON EVIDENCE § 13 (Tillers rev. 1983), and in fact is an underlying premise of the hearsay rule and other standards of evidence.

The respondent insists that it is just as difficult for jurors to limit their consideration of such evidence, Brief for the Respondent at 37-38, and again we must rely on intuition and human experience to analyze this claim. In *Bruton,* as well as in *Nash v. United States,* 54 F.2d 1006, 1006-1007 (2d Cir. 1932), the jurors were asked to use the evidence for two different purposes at different times in their joint deliberations; to consider the truth of the confession as to one defendant and to ignore it altogether as to the other. In the instant case, however, the jurors were required to use the evidence for a single purpose, evaluation of the parroting claim, throughout their consideration of the case. A presumption that jurors are unable to perform this simple task would have far-reaching consequences for the jury system as it now exists.

4. The manner of the introduction of the accomplice's confession provides another critical distinction between this case and *Bruton* or *Douglas.* In both of those cases the codefendants' confessions were placed before the jurors during the prosecu-

[6] Even if the plurality opinion in *Parker v. Randolph,* 442 U.S. 62 (1979), could be read to have limited its scope by its comment about a defendant's "unchallenged" confession, *id.* at 73, the distinction has no application in a case where, as here, the defendant has called into issue the terms of his accomplice's confession, thereby informing the jury of its existence.

tion's case in chief, along with other proof of the elements of the crime and the guilt of the defendant. In the instant case, on the other hand, Peele's confession was part of the State's rebuttal proof, emphasizing to the jurors that the confession was to be considered only as it impeached Street's parroting claim.

In addition, as has been pointed out by the United States as *amicus curiae,* Brief for the United States at 17-19, the prosecuting attorneys carefully focused both the examination of Sheriff Papantoniou and their closing arguments on the minor discrepancies that belied Street's parroting claim, and not on the incriminating nature of Peele's confession.

Finally, the trial court instructed the jury three times to limit its consideration of Peele's confession. While the respondent has declined to challenge the sufficiency of these instructions, Brief for the Respondent at 13 n. 6, it should be stressed that in each instance the court instructed the jurors not to consider Peele's statement for the truth of the matters asserted therein. (J.A. 292, 293, 350.)

5. Thus it can be seen that the factual differences between this case on the one hand, and *Bruton* and *Douglas* on the other, compel the conclusion that the jurors in the instant case could reasonably be expected to consider Peele's confession only for impeachment purposes, and not for the truth of the matters asserted therein. And once that conclusion has been reached, the respondent's contentions about availability, reliability, and the utility of cross-examination are irrelevant. Since it was the terms of Peele's confession, and not its truth, that was before the jury, nothing said by Peele himself could assist the jury in its

evaluation of the parroting claim, and there is no confrontation concern.[7]

B. Introduction Of The Entire Text Of Peele's Confession Was The Only Effective Method Of Impeaching The Parroting Claim.

The respondent suggests throughout his brief that the reading of the entire text of Peele's confession was not necessary to accomplish the State's purpose, impeachment of Street's parroting claim. He specifically puts forward three alternatives.

First, of course, the respondent asserts that Peele's confession should not have been introduced at all, since the State had already accomplished its impeachment through cross-examination of Street and the presentation of witnesses who were present at Street's confession. Brief for the Respondent at 16-17, 22-23. This argument is self-defeating, for if the State had so convincingly impeached Street, his guilt became a foregone conclusion, and it is difficult to see how Peele's confession could have made any difference, much less be "devastating." In any event, the State's witnesses all had vested interests in the outcome of the trial, and the State was entitled to resolve the "swearing contest" by introducing the best evidence of the veracity of the parroting claim, Peele's confession.

Second, the respondent suggests that Peele's confession could have been edited by substituting the term "another fellow" for all of the names of individuals besides Peele. Brief for the

---

[7] With respect to the nonissue of availability, we do not understand the respondent's indignation over the Solicitor General's reference to the reasons that Peele was not called by the State at trial, reasons which were well known to all of the parties. *See* Brief for the United States at 2 n. 1; Brief for the Respondent at 16 n. 7, 20 n. 11, 24-25. It is plain to us that the Solicitor General was not attempting to justify Peele's absence by asserting that he was "unavailable," but instead was making the opposite point that Peele was equally available to both sides. *See* Brief for the United States at 24.

Respondent at 25-26. Putting aside the respondent's failure to make such a suggestion in the state courts, this device would not have been effective to reduce the risk of improper inference by the jury. For example, Street had asserted in his confession of September 17, 1982 that he put the gag in the victim's mouth, Peele and Montgomery carried the victim out of the house, Street was in the truck with Peele while Montgomery climbed into the tree, and Peele placed the rope around the victim's neck after Montgomery handed the rope down from the tree. (J.A. 358.) Peele's confession, as redacted, would have stated in pertinent part (J.A. 302):

> *Another fellow* and I lifted Ben Tester up. *Another fellow* had a piece of cloth, white, that he gagged Ben Tester with. When *the other fellow* gagged Ben Tester he tied the knot behind his head. . . . *Another fellow* and I got Ben Tester by the shoulders. *Two other fellows* got him by the feet. We four picked Ben Tester up and carried him out the front door. . . . We laid Ben Tester down on the tailgate. *Another fellow* and I got up in the truck bed. *Two other fellows* climbed up in the tree. *Another fellow* handled the rope . . . and tied it off with a knot. . . . *Another fellow* and I put the loops around Ben Tester's head and down around his neck. *Another fellow* and I lifted Ben Tester off the tailgate. . . . *Two other fellows* got out of the tree.

No reasonable juror would be fooled by such a redaction, concluding for example that Street was Peele's assistant in the hanging since the other two fellows (whom the juror knows to have been Montgomery and Causby, per Street's confession) were still in the tree. Indeed, it seems that the greater danger is that a juror might assume that Street was the "other fellow" more often than he really was, to Street's prejudice.

Finally, the respondent suggests that the trial court could have redacted from Peele's confession only those portions which "seriously inculpated Street," pointing out seven items

absent from Peele's confession but present in Street's. Brief of the Respondent at 26-27. Of course, as we have argued, none of Peele's confession was "seriously inculpatory" in light of Street's own admissions. But in any event, this approach oversimplifies the task of comparing and contrasting the two lengthy confessions, and leaves open to dispute which portions of Peele's confession were "seriously inculpatory" of Street. Furthermore, some of the most crucial differences (impeaching Street's parroting claim) involved the execution of the murder itself.

C. Use Of The "Sword-Shield" Principle Is Not Inappropriate In The Instant Case.

To emphasize the inequity of Street's defensive technique, we noted in our main brief this Court's holdings which prohibit a defendant in certain circumstances from using his or her constitutional rights to pervert the truth-finding function of a criminal trial. Brief of the Petitioner at 18-20. The respondent's attack on this analogy to the "sword-shield" principle does not withstand analysis. *See generally* Brief of the Respondent at 18-22.

First, the respondent suggests that, like the ban on coerced statements, confrontation is an absolute right which can never be waived or restricted. This suggestion, however, flies in the face of the flexible approach the Court has taken toward the Confrontation Clause in cases such as *Dutton v. Evans,* 400 U.S. 74 (1970), *California v. Green,* 399 U.S. 149 (1970), and *Ohio v. Roberts,* 448 U.S. 56 (1980).

Second, the respondent asserts that the "sword-shield" principle applies only in cases where a constitutional right has been fashioned into a prophylactic rule of evidence, without regard

for the truthworthiness of the evidence.[8] This is simply not true. Consider, for example, the following language from *Michelson v. United States,* 335 U.S. 469, 479 (1948), which discussed when the prosecution may use character evidence against a defendant:

> The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him.

Regardless of these technical matters, the most compelling reason for reversal of this case remains: It is inherently inequitable, and damaging to the truth-finding process, to allow a defendant such as Street to call into issue the terms of a document, literally inviting comparison, but then to permit him to prevent revelation of the document to the jury on the ground that he cannot irrelevantly confront its author.

D. The Decision Of The Court Of Criminal Appeals Was Not Based On An Adequate And Independent State Ground.

The respondent asserts that the decision of the Court of Criminal Appeals, to the extent that it is based on the "interlocking confessions doctrine," is somehow based on an adequate and independent state ground, depriving this Court of jurisdiction. Brief for the Respondent at 29-32. This argument

---

[8] The respondent suggests that "shields" such as that provided by *Miranda v. Arizona,* 384 U.S. 436 (1966), "notably do not enhance, and in fact are frequently hostile to, the quest for truth." Brief for the Respondent at 21. This is a surprising assertion in light of the following language in *Miranda,* 384 U.S. at 466:

> That counsel is present when statements are taken from an individual during interrogation obviously enhances the integrity of the fact-finding processes in court.

Significantly, the *Miranda* violation in *Oregon v. Hass,* 420 U.S. 714 (1975), was the failure to provide a requested lawyer.

reflects a misunderstanding of the "interlocking confessions doctrine," as well as a misreading of Tennessee cases on the point.

As explained by the plurality opinion in *Parker v. Randolph,* 442 U.S. 62 (1979), a determination that a codefendant's confession "interlocks" with the defendant's is nothing more than a determination that the codefendant's confession is not "devastating" under *Bruton,* which is what the State has attempted to demonstrate here and in the lower court. Therefore any treatment of the issue must rely on *Bruton* and its parameters, or on cases which hold a state's constitutional confrontation guarantee to provide protections similar to or greater than the Sixth Amendment as interpreted in *Bruton.*

The firm federal constitutional basis for the decisions of Tennessee courts on this issue is unmistakable. The Court of Criminal Appeals in the instant case relied heavily on *Bruton* and *Douglas* in determining whether a confrontation violation occurred (Pet. App. at A-8 - A-10), and made no reference whatsoever to the Tennessee Constitution. The court turned next to this Court's opinions in *Parker,* but finding no guidance then turned to the opinion of the Tennessee Supreme Court in *State v. Elliott,* 524 S.W.2d 473 (Tenn. 1975).

It is difficult to understand how *Elliott* could be read as anything but an attempt to determine the parameters of *Bruton.* In its discussion of the confrontation problem, 524 S.W.2d at 477-478, the *Elliott* court mentioned only the federal constitutional confrontation provision, and referred to the "*Bruton* rule" no less than five times. When the court finally reached a harmless error finding, furthermore, it cited only this Court's opinion in *Harrington v. California,* 395 U.S. 250 (1969).[9]

---

[9] It is interesting to note that the Court of Appeals for the Sixth Circuit, in reviewing Otis Elliott's habeas corpus claim, also characterized the Tennessee Supreme Court's decision as having been based on *Bruton. Elliott v. Thompson,* 599 F.2d 767, 769-770 (6th Cir.), *cert. denied* 444 U.S. 932 (1979). Apparently there was no question that Elliott had "exhausted" the federal constitutional claim. *See Anderson v. Harless,* 459 U.S. 4 (1982).

Examination of the two state cases cited in *Elliott* confirms the federal basis for Tennessee's decisions on the subject. The court in *O'Neil v. State,* 2 Tenn. Crim. App. 518, 529-532, 455 S.W.2d 597, 602-604 (1970), based its discussion of the confrontation problem in that case solely on *Bruton* and the Sixth Amendment, as did the court in *Briggs v. State,* 501 S.W.2d 831, 835 (Tenn. Crim. App. 1973). We are aware of no Tennessee case that even cites to the applicable state constitutional provision in a *Bruton*-type situation, much less any suggestion that the Tennessee Constitution might provide an independent basis for a stricter application of the "interlocking confessions doctrine."[10]

Under these circumstances, it is obvious that the lower court decision in this case "fairly appears to rest primarily [if not exclusively] on federal law . . .." *Michigan v. Long,* 463 U.S. ____, ____, 103 S.Ct. 3469, 3476 (1983). Therefore the jurisdiction of this Court is clearly established.

[10] Indeed, we are unaware of any Tennessee case even suggesting the holding in *Bruton* would be required under the Tennessee Constitution.

CONCLUSION

The judgment of the Court of Criminal Appeals of Tennessee should be reversed.

Respectfully submitted,

W. J. MICHAEL CODY
Attorney General of Tennessee

ROBERT A. GRUNOW
Associate Chief Deputy Attorney General

WAYNE E. UHL
Assistant Attorney General

J. ANDREW HOYAL II
Assistant Attorney General

450 James Robertson Parkway
Nashville, Tennessee 37219-5025
(615) 741-7087
Attorneys for Petitioner